



REPUBLIC OF KENYA



**Chero & another v Ngoche & another (Civil Appeal E019 of 2021)
[2023] KEHC 613 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E019 OF 2021
KW KIARIE, J
FEBRUARY 9, 2023**

BETWEEN

DANIEL DIMBA CHERO 1ST APPELLANT

CHARLES OTIENO OJWANG 2ND APPELLANT

AND

**MARY AWUOR AUMA (SUING AS A LEGAL REPRESENTATIVES OF THE
ESTATE OF CALEB ONYANGO NGOCHE-DECEASED) 1ST RESPONDENT**

QUINTER AUMA NGOCHE 2ND RESPONDENT

*(Being an Appeal from the judgment in Homa Bay Chief Magistrate's
CMCC No. 22 of 2017 by Hon. R.B.N Maloba–Principal Magistrate)*

JUDGMENT

1. Daniel Dimba Chero and Charles Otieno Ojwang the appellants herein, were the defendants in Homa Bay Chief Magistrate's CMCC No. 22 of 2017. This was a claim that arose from a road traffic accident involving motor vehicle registration number KCA 154C matatu owned by the 2nd appellant and which was at the time of the accident being driven by the 1st appellant and motor vehicle KAS 686H Nissan Sunny. The deceased who was a passenger in motor vehicle registration number KCA 154C was fatally injured. The 1st appellant was blamed for the accident and the second appellant was vicariously held liable. The learned trial magistrate delivered judgment dated 5th February, 2021. She held the appellants 100% liable. She awarded Kshs. 2,300,000.00 in general damages in favour of the respondents.
2. The appellants were aggrieved by the said judgment and filed this appeal. They were represented by the firm of Kimondo Gachoka & Company Advocates. They raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and in fact in awarding liability at 100% in favour of the plaintiffs as against the defendants despite overwhelming evidence to the contrary.



- b. That the learned trial magistrate erred in law and in fact in awarding k shs.2, 300,000/- as damages which amount was excessive and lacked basis.
 - c. That the learned trial magistrate erred in law and in fat in awarding kshs.2,080,000/- as general damages for loss of dependency which amount was excessive, unjustified and contrary to the evidence on record.
 - d. That the learned trial magistrate erred in law and in fact in awarding kshs.200,000/- as general damages for loss of expectation of life which amount was excessive, unjustified and contrary to the evidence on record.
 - e. That the learned trial magistrate erred in law and in fact in failing to find that since the multiplicand was not pleaded, then the same was not proved the minimum wages for the material time was applicable in the circumstances. (That is, legal Notice NO.117 of 2015, the Regulation of Wages (General) (Amendment) Order, 2015).
 - f. That the learned trail magistrate erred in law and fact in adopting a multiplier of 20 years despite overwhelming evidence to the contrary and which assessment was high and unjustified.
 - g. That the learned trial magistrate erred in law and in fat by failing to consider and appreciate the applicable principles in assessment of damages and thereby arrived at an excessive and unjustified award.
 - h. That the trial magistrate erred in law and fact by failing to consider the Appellants' evidence and submissions on record.
3. The appeal was opposed by the respondent through the firm of Everlyne Kuke & Company Advocates. They contended that the liability and the quantum of damages cannot be faulted.
 4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
 5. In their pleading, the appellants contended that the complained of accident did not occur. In the alternative, they attributed the accident to the deceased and the driver of motor vehicle registration number KAS 686H Nissan Sunny. The denial of the existence of the accident and then to plead in the alternative raises credibility issue on the person thus pleading.
 6. Whereas it is possible that the accident could have been caused by the other motorist if properly pleaded and evidence adduced to support the same, it is incredible to allege a passenger was the author of the accident without pleading how he caused the accident and evidence to that effect adduced.
 7. In the circumstances of this case, the trial court was justified to infer that without an explanation from the appellants, they were 100% liable for the accident.
 8. On the head of pain and suffering the learned trial magistrate gave an award of Kshs. 20,000 for the deceased died on the spot. I have no reason to interfere with this award.
 9. The learned trial magistrate gave other awards as follows:
 - a. Loss of expectation of life Kshs. 200,000; and
 - b. Loss of dependency Kshs. 2,080,000



10. Upon my perusal of several decided cases, I find that the conventional award for loss of expectation of life is Kshs. 100,000. I will therefore set aside the award by the trial court and substitute it with an award of Kshs. 100,000.
11. The trial court in arriving at the award for loss of dependency was guided by the decision in *Rosemary Mwasya v Steve Tito Mwasya & another* [2018] eKLR where the Court of Appeal stated:
The figure chosen of Kshs. 118,546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions which in our view would have amounted to one third of the figure chosen as the multiplicand which would work out as Kshs. $118,546/= \times \frac{1}{3} = 39,512$.
12. At the time of death the deceased was 36 years old. Retirement age is 60 years. Since she factored the element of taxation, her use of 20 years as the multiplier cannot be faulted. I have no basis to interfere with this award.
13. Since the appeal has partially succeeded, the appellants will be entitled to a quarter costs in this court.

DELIVERED AND SIGNED AT HOMA BAY THIS 9TH DAY OF FEBRUARY, 2023

KIARIE WAWERU KIARIE

JUDGE

